U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 04 January 2005

CASE NOS.: 2004-LHC-693
2004-LHC-694

OWCP NOS.: 07-158007
07-167408

IN THE MATTER OF:

KENNEDY LADNER,

Claimant

v.

AVONDALE INDUSTRIES, INC.,

Employer

APPEARANCES:

WOODROW PRINGLE, III, ESQ.

For The Claimant

DONALD P. MOORE, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Kennedy Ladner (Claimant) against Avondale Industries, Inc., (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 12,

2004, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 14 exhibits, Employer proffered 14 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer on October 21, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on June 9, 1999, September 21, 2000 and on August 17 or 19, 2001.

2. That Claimant's injuries occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accidents/injuries.

4. That Employer was timely notified of the accidents/injuries.

5. That Employer filed a timely Notice of Controversion.

6. That Claimant received temporary total disability benefits from September 22, 2000 through December 28, 2000 for total compensation of $20,436.12.

7. That Claimant's average weekly wage at the time of injury was $480.05.

8. That medical benefits for Claimant have been paid in the amount of $17,938.48, pursuant to Section 7 of the Act.

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.____ ; Claimant's Exhibits: CX-____; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on November 25, 1960. He attended high school until twelfth grade, but never received a high school diploma, or a GED.[2] He had a working knowledge of carpentry and had been employed as a shipfitter for 12-15 years. Claimant had been employed with Employer since 1995 or 1997.

On June 9, 1999, Claimant suffered a work-related left knee injury requiring surgery. Claimant underwent surgery for the injury and was paid appropriate compensation. Claimant was able to return to his former duties after recovering from the June 9, 1999 incident. He suffered another employment-related left knee injury on September 21, 2000, for which he received temporary total disability and a payment of scheduled permanent partial disability.[3] After recovering from the September 21, 2000 injury, Claimant again returned to his former employment position with Employer. (Tr. 16-18, 40).

On or about August 19, 2001,[4] Claimant experienced an increase in knee pain, for which temporary total disability was paid. Regarding this incident Claimant stated that the knee "just went back out." He testified that he twisted the knee while stepping off a ladder onto a platform. Disability benefits related to this injury were paid from August 20, 2001 until October 2, 2001, when benefits were terminated because

---

[2] On his job application with Employer, Claimant misrepresented that he graduated from high school. (Tr. 35-36).

[3] Scheduled permanent partial disability for a 25% loss of leg was paid in the amount of $23,042.16, as a result of the September 21, 2000 work injury. (EX-5, p. 4; CX-6, p. 13).

[4] The date of the third injury is not clear; August 17, 19, and 21, 2001 are all suggested as the date of the injury.

Claimant had resumed working with Employer, but at a "light-duty" position. Claimant's "light-duty" employment entailed working in the "tool room," signing out welding tools. Claimant continued full-time, "light-duty" employment for over a year, until November 11, 2002. Claimant testified that from September 2001 to November 2002 he was not physically able to perform his former job as a shipfitter. (Tr. 18-20).

The tool room job involved Claimant standing only when other workers came to the window to pick up tools and being able to sit the rest of the time. While the position was largely sedentary, Claimant testified that he continued to experience physical problems with his knee while working in this position. He described condition of his knee as "[I] couldn't stand on it, my knee would go out over a period of time . . . It'd just lock up and go to hurting." However, Claimant continued to work with Employer until November 11, 2002. After his tool room position ceased, Claimant continued experiencing pain and limited activity because of his knee. He described his knee condition as enabling him to stand for a period of about thirty minutes straight, but then the knee experiences cramping and he has to stretch it and sit for an hour or two. He stated he can only walk "a couple of hundred yards . . . [until it] gets to hurting pretty good." He claimed his knee has curtailed his ability to swim, play baseball, ride horses and hunt. He stated he can feel when his leg is going to go out from under him and usually tries "to sit down before it gets that far." He has been able to prevent himself from falling. (Tr. 19-23).

Although Claimant has worked as a carpenter in the past, he stated he would not be able to do carpentry work now or return to his former shipfitter work because of the requirement to bend, climb and squat. (Tr. 24).

Claimant's employment status upon leaving Employer in November 2002 is not entirely clear. Claimant testified, they "told me that I was going back out through medical, that they didn't have no [sic] more light-duty [employment], that they had put me back on workman's comp." Claimant testified that he could perform the tool room work, but Employer has not called him back to work since November 11, 2002. Claimant also testified that he received "holiday pay" for Thanksgiving and Christmas in 2002, but did not remember such benefits carrying into 2003. After November 2002, Claimant sought Mississippi state unemployment benefits. He testified that initially Employer "denied it," but Claimant and his wife appealed, after which he received unemployment benefits. (Tr. 25-28).

On cross-examination, Claimant affirmed that he first applied for work on January 21, 2003. (Tr. 29; CX-4). Claimant submitted a handwritten "diary of employment searches and results." The employment diary included a list of twelve jobs that were investigated by Claimant, starting January 1, 2003 and ending June 10, 2004. The diary included the date of each job inquiry, employer's name, contact, position sought ("helper" was listed as every position), and availability status.

He spoke with representatives of Bencolle, P & J Construction and Price's Vinyl Siding in February 2003 about a job, but did not complete a job application. (Tr. 29-30). He applied for a job as a "helper" at Cash & Carry on January 22, 2003. In March 2003, he talked to Brian Swilley about a "helper" job at Swilley's Dairy Farm. (Tr. 30; CX-4, p. 1). He filed job applications in April 2003 at P. L. Construction and Class A Painting for "helper" positions. (Tr. 31; CX-4, p. 1).

He did not apply for any jobs after April 25, 2003, until August 21, 2003, when he applied for a "helper" job at Willis Construction. (Tr. 31; CX-4, p. 2). He did not seek any work or jobs in September 2003. On October 23, 2003, he spoke to the owner of Dolly's Quick Stop about a "helper" job. He sought no jobs or work in November or December 2003. On January 5, 2004, he applied for a "helper" position at Malley's Construction. He did not seek work in February 2004. (Tr. 23). On March 4, 2004, he contacted Moran Construction for a helper job and was told there was no work. (Tr. 32; CX-4, p. 2).

Claimant did not search for work in April or May 2004, but on June 10, 2004, contacted Southern Tire Mart about a "helper" job. He was told there was no work available. (Tr. 33; CX-4, p. 2). As of the August 12, 2004 hearing date, Claimant had not made any other job contacts. From November 11, 2002, to the date of hearing, Claimant made 12 job contacts. (Tr. 33).

Claimant acknowledged that the last time he saw Dr. Graham was in January 2002. (Tr. 38-39).

Cheryl Ladner

Cheryl Ladner, Claimant's wife, testified concerning Employer's actions after Claimant was released from light duty on November 11, 2002. Mrs. Ladner testified that "they" told Claimant "workman's comp would be taking up the case and everything." After three weeks, Mrs. Ladner contacted

"workman's comp" and representatives of Employer, "Sherry up in the office" and "Jimmy, the medical man." First, Mrs. Ladner contacted workman's compensation, who indicated that Claimant was "laid off." Mrs. Ladner then contacted Sherry, who directed her to Jimmy. According to Mrs. Ladner, Jimmy stated, "No, he was put out on medical for industrial medical leave, for his injury, that workman's comp would be picking back up for him." Jimmy called workman's comp and told Mrs. Ladner, "he can't get anything out of them, all they're saying is they're not paying, that he was put off on layoff." (Tr. 46-47).

Mrs. Ladner's testimony indicates she thought that if Claimant was laid off, perhaps he could receive unemployment benefits. Thus, she testified:

> [I] Called unemployment, told them the situation, that they said he was out on medical, one says he's on layoff, one says he's medical, and they said, "Well being that he had been working and not directly under the doctor he was eligible for unemployment." (Tr. 47).

After filing for unemployment, Mrs. Ladner testified Employer "appealed" unemployment benefits claiming, "he was out on industrial medical leave, that he was not laid off." Mrs. Ladner also indicated that Merrill Lynch reported they had not received any "401 papers," which they typically receive after an employee is laid off. After talking with Merrill Lynch, Mrs. Ladner testified that she again contacted Sherry, who explained, "Well he's not going to get anything . . . He's not laid off, he's out on industrial medical leave and he can't get his 401, the onliest [sic] thing he can do is maybe make a loan against it." (Tr. 47-49).

By March 2003, Mrs. Ladner indicated she took steps to file the appropriate paperwork for a loan against "disability insurance," but when Claimant sought additional required signatures, he was notified by Employer that he "couldn't do it because he [Claimant] wasn't listed as an employee anymore; after a year they [Employer] dropped him [Claimant] [from employee status]." (Tr. 48-49). Mrs. Ladner described this interaction:

> So, they had to sent [sic] it to New Orleans, Lana Chaisson I think is her name. Talked to her after we didn't receive the paper back. And she said, "Well we can't do it," she said, "This is a workman's comp

> case, and he's not listed as our employee anymore so we can't be signing these papers." I said, "Well what am I supposed to do, workman's comp's not taking on the case, they're not wanting to do anything," and she said, "Well I'll go ahead and sign it this time but I can't do it anymore," and it's just been back and forth, back and forth. (Tr. 49).

Mrs. Ladner testified that Claimant's physical ability is greatly restricted. He no longer swims, cuts grass and cannot continue the remodeling work he was doing on their house. (Tr. 49-50).

The Medical Evidence

Ronald A. Graham, M.D.

Dr. Graham, of the Orange Grove Bone & Joint Clinic, is Claimant's treating physician and his medical records, including records related to the September 21, 2000 injury, were entered into evidence. (EX-8; CX-6; CX-7; CX-8). Dr. Graham has treated Claimant since his June 9, 1999 knee injury and performed all three surgeries.

Regarding Claimant's September 21, 2000, injury, Dr. Graham noted that clinical examination and MRI scans both indicated a posterior horn tear in Claimant's medial meniscus. (EX-8, p. 3). Arthroscopic loose body excision surgery was performed on November 3, 2000 and four "loose bodies" were removed from around the lateral meniscus posterior horn. (CX-8, pp. 3-4). Post-surgical physical therapy was conducted in eleven sessions from December 12, 2000 to January 12, 2001 and Claimant returned to his previous full-time employment as a shipfitter on December 29, 2000. A January 18, 2001 physical therapy report, however, indicated "no improvement," denoting continued pain when walking, standing and kneeling. (CX-9, pp. 1-12).

On January 25, 2001, Dr. Graham re-evaluated Claimant's condition. Dr. Graham recommended permanent work restrictions of "no running, no jumping off anything like loading docks, no climbing scaffolds or poles [and] wear . . . cleats on [his] feet." Dr. Graham also recommended Claimant wear a hinged knee brace when walking on rough ground. Additionally, Dr. Graham placed Claimant at maximum medical improvement and assessed Claimant's permanent impairment rating based on a 1% cartilage interval, which translated into a 25% lower extremity impairment, resulting in a 10% whole person impairment rating as

a result of Claimant's September 21, 2000 knee injury pursuant to the AMA Guidelines. The doctor also opined Claimant will continue to have recurring symptomatology and will likely need future procedures to remove loose bodies. (EX-8, p. 20). In response to Dr. Graham's assessment of 25% lower extremity impairment on February 13, 2001, scheduled permanent partial disability payments began, which were paid in full. (EX-5, pp. 2, 5).

On August 17, 2001, the chart note of Dr. Hull of Employer's on-site medical facility reveals that Claimant presented with swelling in his left knee since August 15, 2001. Dr. Hull's diagnosis was internal derangement, left knee. He referred Claimant to Dr. Graham. (EX-8, p. 6).

Dr. Graham examined Claimant on August 21, 2001. Dr. Graham reported that Claimant did not designate a single acute traumatic incident and complained instead of a two-week history of increased severe pain. Dr. Graham stated that Claimant could return to work, but restricted him to light work. Additionally, loose bodies were suspected and a third surgery on Claimant's left knee was scheduled for September 14, 2001. (EX-8, pp. 21-22).

Dr. Graham conducted arthroscopic chondroplasty of the left medial femoral condyle and removal of multiple loose bodies on September 14, 2001. One "large" loose body was found and removed. (CX-8, pp. 1-2). Dr. Graham examined Claimant on September 20, 2001 and remarked that Claimant could return to light-duty work September 21, 2001, but was unable to run, jump or climb. (CX-6, p. 19). Dr. Graham reviewed Claimant's work status on October 18, 2001, and reiterated the following restrictions: no running, no jumping, no climbing scaffolds, no climbing ladders and no kneeling. Dr. Graham acknowledged Claimant's new "tool room" work and expressly permitted it. (CX-6, p. 22). Although Claimant's restrictions increased, the record discloses no additional impairment ratings were assessed for the August 19, 2001 knee injury.

During his employment in Employer's tool room, Claimant continued to be examined by Dr. Graham. Because of deficits in his quadriceps and confirmed pain complaints in his calf muscles, Dr. Graham recommended a vascular survey to rule out ischemia from resolving compartment syndrome or deep venous thrombosis. (EX-8, pp. 27-28). On March 19, 2002, Dr. Graham opined that Claimant's work restrictions were now permanent. (CX-6, pp. 23-27, 32-34).

The Vocational Evidence

Two labor market surveys were performed by Tommy Sanders, a certified rehabilitation counselor on March 10, 2003 and June 23, 2004. The March 10, 2003 survey also included a retroactive survey for jobs available on or about November 12, 2002. It was determined that Pinkerton's Security hired security guards in November 2002 with wages of $5.90 per hour; Republic Parking hired a cashier during the same period and Munro Petroleum hired cashiers in 2002. (EX-10, p. 6). No specific factual descriptions or requirements of these jobs were contained in the survey.

The August 16, 2004 post-hearing report noted that of the "retroactive jobs identified on or about November 12, 2002," the Pinkerton jobs would be eliminated because of a requirement for a high school education. (EX-14).

The March 10, 2003 survey utilized Dr. Graham's January 25, 2001 restrictions, including: "If walking on construction ground, [Claimant] should wear a hinged knee brace and should avoiding running or jumping off loading docks, climbing on scaffolding or poles or wearing cleats on his feet." The survey reviewed Claimant's employment application with Employer, which depicted Claimant as a high school graduate. The report noted "Additionally, he should be qualified based on him being a high school graduate to perform a number of unskilled to semi-skilled jobs." (EX-10, pp. 5-7)

The March 10, 2003 survey identified the following jobs:

1) Two cashier positions with Republic Parking at the Gulfport-Biloxi Airport, who works in a booth accepting payments and providing receipts. The worker can alternatively stand, walk and sit. The job entails occasional lifting 2 to 3 lbs. It paid $6.00 an hour and is a 32-hour a week job.

2) Two security guard positions with Casino Magic in Bay St. Louis, working in a security booth and completing records using a shift activity log. The job requires good oral and written communication skills. The position entailed assisting in the transportation of chips, occasional lifting of 50 lbs., bending, stooping, kneeling,

and squatting with frequent standing and walking. It paid $7.27 an hour and is a 38-hour per week job.

3) Two cashier positions with Munro Petroleum, operating a cash register and credit card machine. The worker may assist in cleaning a snack area and some minor stocking duties. However, stocking is primarily performed by an attendant. There are stools for sitting, but the job requires frequent walking, occasional lifting of 5 to 10 lbs., bending and stooping. It paid $6.00 an hour and is a 36-hour a week job. (EX-10, p. 6).

The June 23, 2004 labor market survey also relied on Dr. Graham's January 25, 2001 restrictions and Claimant's assertion that he has a high school diploma. The following jobs were found to be appropriate:

1) Two RV park attendant positions with Casino Magic, whose duties involve greeting and assisting guests, assigning campsites, recording site availability and collecting RV campsite fees. The employee would drive a company vehicle or golf cart and alternate sitting and standing. Occasional lifting of 10 to 20 lbs. is needed with occasional sitting, bending and stooping, with frequent standing, walking and handling. The job paid $7.10 an hour and is a 40-hour a week job.

2) A security guard position with Securitas in Gulfport, Mississippi, which involved securing assigned locations, completing activity logs and monitoring activities around premises. The job involved sitting, walking and standing and had negligible lifting. It paid $5.50 an hour and is a 40-hour per week job.

3) Three housekeeper positions with Grand Casino/Gulfport, Mississippi, involving dusting, cleaning glass and mirrors, elevators, paintings, framed pictures and other casino areas. There is frequent to constant standing and walking with occasional bending, stooping, squatting, and lifting of 10 to 20 lbs. and frequent lifting of 5 to 10 lbs. The job paid $6.75 an hour and is a 40-hour per week job. (EX-10, pp. 1-2).

The post-hearing vocational opinions, which were solicited because of Claimant's misrepresentation of his high school education, indicated that of the six employment positions in the March 10, 2003 survey recommended for Claimant, only 2 were

still suitable. All three job categories of the June 23, 2004 survey required a high school degree, thus none were suitable for Claimant. (EX-14).

The post-hearing August 16, 2004 vocational report also provided a follow-up survey based on the fact that Claimant was not a high school graduate. Mr. Sanders identified the following jobs:

> 1) A cab starter job with Republic Parking at the Biloxi-Gulfport Airport paying $6.00 per hour for 40-hours a week. The job involved standing or sitting at a podium to direct passengers to cabs, limos, shuttle buses and other modes of transportation.
>
> 2) A fuel booth cashier position with Coastal Energy, who would be required to lift 10 lbs. or less, occasional squatting and bending and the ability to alternative sitting, walking and standing. The job paid $6.15 per hour and required 16 to 40 hours of work a week.
>
> 3) A security guard position with Swetman Security requiring employee to "make rounds" of 15 to 30 minutes, act as a gate guard, transfer calls and check credentials of visitors. It paid $7.00 an hour and entailed a 40-hour week.
>
> 4) A cashier position at Krispy Kreme involved taking and preparing customer's orders, operating a cash register and keeping the restaurant clean. Lifting involved 10 pounds occasionally and two to five pounds frequently, frequent standing and walking with occasional bending, squatting and stooping. It paid $5.15 an hour and entailed 40 hours a week. (EX-14, p. 2).

The Contentions of the Parties

Claimant contends he has been permanently totally disabled since November 11, 2002. He argues that Employer did not satisfy its Turner burden, requiring a showing that suitable alternative employment existed. In the alternative, Claimant contends he has rebutted Employer's Turner burden, by showing that he was unable to secure any suitable alternative employment, "light duty" or otherwise, despite exercising due diligence.

Employer concedes that Claimant cannot return to his former

job as a shipfitter. Employer argues Claimant can perform other work and contends it satisfied the Turner burden through two labor market surveys, which considered Claimant's education, work experience and physical restrictions and produced several suitable alternative employment positions. Employer further contends that Claimant did not exercise due diligence in seeking alternative employment. Thus, Claimant is only partially disabled and restricted to scheduled recovery pursuant to Potomac Electric Power Co. (PEPCO) v. Director, OWCP, 449 U.S. 268 (1980).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated to three compensable work-related left knee injuries occurring during the course and scope of his employment on June 9, 1999, September 21, 2000 and on (or around) August 19, 2001. Furthermore, there existed a employer/employee relationship at the time of all three accidents. (JX-1).

Notwithstanding the stipulation that Claimant suffers from compensable injuries, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C &

P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant has established a **prima facie** case of total disability. After the August 21, 2001 injury and September 14, 2001 surgery, for which he received temporary total disability benefits, Claimant never returned to his previous job duties. Claimant credibly testified that while working light duty in the tool room, he could no longer physically return to his former job as a shipfitter because of limitations of standing, his knee would "go out," lock up and hurt. His knee has continued to have the same symptoms since his tool room work ended on November 11, 2002. He has difficulty bending, climbing stairs, kneeling and squatting. He also testified he could not perform his former job after November 2002 through the date of the formal hearing for the same reasons/limitations.

Upon returning to Employer, Claimant assumed a "light-duty" position in Employer's tool room. Employer concedes that Claimant is not able to return to his shipfitter position. On January 25, 2001, Dr. Graham opined that Claimant's "light duty" work restriction was permanent in nature and placed Claimant at maximum medical improvement. No additional MMI or permanent impairment ratings of record were rendered by Dr. Graham as a result of Claimant's August 19, 2001 knee injury. On March 19, 2002, Claimant's restrictions became permanent.

On November 11, 2002, Claimant was laid-off according to Employer because of the non-availability of tool room work. The record is devoid of any evidence that Claimant was terminated for misconduct or engaged in any personal actions which would have caused the loss of his light duty employment. Rather, Employer withdrew the continued opportunity for light duty work in the tool room resulting in suitable alternative employment no longer being available to Claimant after November 11, 2002.

Since Claimant could not return to his former shipfitter job and could no longer perform the light duty tool room position, Employer was obligated to demonstrate the availability of other suitable alternative employment. See Mendez v. National Steel and Shipbuilding Company, 21 BRBS 22, 24-25 (1988). I find Employer so obligated, even though Claimant worked suitable alternative employment in the form of the tool room job for a significant time period, because Employer ceased the availability of suitable alternative employment in its facility.

Since Employer did not establish suitable alternative employment until March 10, 2003, as discussed below, Claimant is entitled to permanent total disability compensation benefits from November 12, 2002 to March 9, 2003, based on his average weekly wage of $480.05.

Thus, I find Claimant was unable to return to his former shipfitter position and has established a **prima facie** case of permanent total disability having reached maximum medical improvement on January 25, 2001, with permanent work restrictions assigned on March 19, 2002.

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to

employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra, at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the

claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra, at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

The March 10, 2003 labor market survey expressly recognized Dr. Graham's restrictions and Claimant's education. Three job categories were recommended: parking lot cashier, security guard and store cashier. The physical requirements and job duties were explicitly presented. There is no record evidence that Dr. Graham approved the jobs.

The June 23, 2004 survey exhibited the same level of detail and thoroughness. Dr. Graham's January 25, 2001 limitations were again expressly considered and Claimant was understood to be a high school graduate. Three more job categories were recommended: RV park attendant, security guard (different position than previous labor market survey) and housekeeper.

At the formal hearing, it was determined that Claimant was not a high school graduate despite representations on his employment application with Employer. This discovery prompted a post-hearing vocational opinion and survey, which re-assessed the two earlier surveys and provided additional suitable alternative employment.

The post-hearing survey was conducted on August 16, 2004. Of the prior positions found to be available and suitable by Mr. Sanders, only two of the positions remained appropriate, since Claimant did not graduate from high school. Specifically, the parking lot cashier and store cashier positions from the March 10, 2003 survey were found to be appropriate, as neither required a high school diploma. The other four job categories all required high school graduation. The August 16, 2004 survey provide detailed descriptions of four additional job positions, available since June 23, 2004: a cab starter; another security guard position; a fuel booth cashier; and a cashier at a restaurant.

The jobs identified by Mr. Sanders in his retroactive

survey for the time period of November 2002 were not described with any specificity. In the absence of evidence of the precise nature and terms of the job opportunities, including the physical and mental requirements of each, a rational comparison with Claimant's restrictions and limitations cannot be made, nor can a determination be rendered about whether such positions are suitable for Claimant. Consequently, I find and conclude Employer failed to establish that the retroactive jobs set forth in the March 10, 2003 survey are suitable alternative employment.

Nevertheless, I find and conclude that suitable alternative employment was demonstrated by Employer effective March 10, 2003. The parking lot cashier and store cashier positions from the March 10, 2003 survey are considered suitable, in light of Claimant's residual capabilities. All of the post-hearing survey positions appear to be appropriate considering Claimant's limitations. In view of the positions identified by Employer's vocational expert, I find that the extent of Claimant's permanent disability is partial rather than total.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra, at 1042-1043; P & M Crane Co., supra, at 430. However, after an employer has satisfied his burden under Turner, the burden of showing due diligence in seeking employment is placed on Claimant. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 961 (5th Cir.), cert. denied, 479 U.S. 826 (1986). Thus, a claimant may be found totally disabled under the Act when he shows he is "unable to secure that particular kind of work." Turner, supra, at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

Although Claimant generally exhibited a willingness to work by seeking State unemployment benefits, I find and conclude that Claimant did not present sufficient evidence to satisfy his burden of showing he exercised due diligence in seeking suitable alternative employment. Claimant "applied" for 12 positions, but only submitted applications for six of the positions from November 2002 to the August 2004 formal hearing.

Claimant did not sufficiently demonstrate whether any of the positions he sought were open, advertised or available or whether such jobs were within his physical and mental

restrictions/limitations. All positions in his diary were listed as "helper" without any further details which is problematic, since the names of eight of the potential employers (P & J Construction, P. L. Construction, Willis Construction, Malley's Construction, Moran Constructions, Class A Painting, Price's Vinyl Siding and Swilley's Dairy Farm) suggest manual labor work. Such work may be physically unsuitable for Claimant considering his restrictions.

While several jobs indicate "nothing available," Claimant did not explain how or why he selected the positions for his job search. He failed to show he applied for advertised open positions and yet nonetheless failed to obtain employment. Instead, the record equally supports a finding that Claimant pursued positions that were not open, available or advertised, in which case a reasonable person would expect him to have difficulty obtaining such employment because the jobs were not available or were already filled. The receipt of unemployment benefits usually requires the concomitant search for work, however no such jobs are reflected in Claimant's diary, nor did Claimant testify about his search for employment through the State unemployment office.

In post-hearing brief, the parties suggest that Claimant also applied for jobs identified in the labor market surveys, however the record does not reflect any transmittal of the labor market surveys to Claimant. Moreover, Claimant's diary does not reflect that he applied for any of the positions, nor did he testify to such a job search. Accordingly, I find and conclude that Claimant did not apply for any of the jobs identified in any of the labor market surveys.

Thus, I find Claimant made twelve inquiries into employment positions over the span of one year and ten months. Furthermore, the positions were not shown to have been available. There is no evidence he pursued any of the positions indicated in any of the surveys. In light of the foregoing, I conclude Claimant failed to exercise due diligence in seeking suitable alternative employment.

Based on the foregoing, I find that Claimant sustained a permanent partial impairment to his left knee as a result of the work injuries on September 21, 2000 and on or about August 19, 2001. Therefore, pursuant to Potomac Electric Power Co. (PEPCO) v. Director, OWCP, 449 U.S. 268 (1980), Claimant's recovery is limited to the schedule of benefits set forth in Sections 8 (c)(2) and 8(c)(19). 33 U.S.C. §§ 908(c)(2) and (19).

In determining the percentage of disability to be applied under the schedule, deference is given to the only medical opinion of record, that of Dr. Graham, Claimant's treating physician. Dr. Graham assessed a 25% impairment to the left lower extremity.

Thus, Claimant is additionally entitled to compensation for permanent partial disability due to the injuries sustained to his left knee on September 21, 2000 and August 19, 2001 at a rate of two-thirds of his average weekly wage of $480.05 for a period of 72 weeks.[5] The record reveals that Employer has paid the scheduled award in the amount of $23,042.16.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment

[5] The period of 72 weeks was determined by multiplying the number of weeks provided in the schedule in Section 8(c)(2) by 25%, the percentage of Claimant's left leg disability. (288 weeks x .25 = 72 weeks).

be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187 (1988).

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

I find and concluded that Employer continues to be responsible to Claimant for any appropriate, reasonable and necessary medical care arising from his compensable work injuries to his left knee.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.[6] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability compensation from September 22, 2000 to December 28, 2000, based on his average weekly wage of $480.05, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from November 12, 2002 to March 10, 2003, based on Claimant's average weekly wage of $480.05, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay Claimant compensation for permanent partial disability, arising from his work-related knee injuries, at a rate of two-thirds of his average weekly wage of $480.05, for a period of 72 weeks (25% of the 288 weeks provided under schedule). 33 U.S.C. §§ 908(c)(2), (19).

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 21, 2000 and August 19, 2001 work injuries, pursuant to the

---

[6] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 29, 2003**, the date this matter was remanded from the Board for consideration of modification proceedings.

provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 4th day of January, 2005, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge